

# **WASHINGTON STATE HUMAN RIGHTS COMMISSION**

## **GUIDE TO SEXUAL ORIENTATION AND GENDER IDENTITY** **AND WASHINGTON STATE NONDISCRIMINATION LAWS**



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# Guide to Sexual Orientation and Gender Identity

## **General Issues**

### **Are people in Washington protected from discrimination on the basis of their sexual orientation under the Washington Law Against Discrimination?**

Discrimination against a person based on that person's sexual orientation is prohibited. That prohibition became part of the Washington State Law Against Discrimination (RCW 49.60) on June 8, 2006. This means that employers, insurers, creditors, housing providers, and places of public accommodation cannot discriminate against an individual because of that individual's sexual orientation.

### **What does sexual orientation mean?**

Sexual orientation is defined as “heterosexuality, homosexuality, bisexuality, and gender expression or identity. As used in this definition, gender expression or identity means having or being perceived to have a gender identity, self-image, appearance, behavior, or expression, whether or not that gender identity, self-image, appearance, behavior, or expression is different from that traditionally associated with the sex assigned to that person at birth.”

### **What is “gender expression or identity”?**

Gender identity or expression is defined in state law as “having or being perceived as having a gender identity, self-image, appearance, behavior, or expression, whether or not that gender identity, self-image, appearance, behavior, or expression is different from that traditionally associated with the sex assigned to that person at birth.”

A common term is “transgender.” This term is an umbrella one for a broad range of people who experience and/or express their gender differently from what is traditionally expected – either in terms of expressing a gender that does not match the sex listed on one’s original birth certificate, or physically changing one’s sex (transsexuals). It also includes people who are cross-dressers or otherwise gender non-conforming. Gender identity and expression also includes males and females who do not express their gender in stereotypically masculine or feminine ways – e.g. through dress or behavior.

### **Is an individual protected if a covered entity (employer, housing provider, etc.) thinks the employee’s sexual orientation is different than what it really is and acts on that perception?**

No. A Washington Appeals Court decision, *Davis v. Fred's Appliance, Inc.*, 287 P.3d 51 (2012) determined that the definition of sexual orientation does not cover "perceived" sexual orientation. So, if someone is not hired because an employer believes that they are gay, but they really are not gay, that person is not protected under the law.

### **Does the law just protect gay people?**

Everyone has a sexual orientation and a gender identity so the law protects everyone, regardless of the person's sexual orientation or gender identity. Although statistics have shown that the most common targets of sexual orientation discrimination are persons who are gay, lesbian, or transgendered, a person who is not hired for a job because they are heterosexual, for example, may have a claim of discrimination.

**Does this law allow persons of the same sex to get married?**

No; marriage between persons of the same sex is addressed under other state laws. When enacted, RCW 49.60 specifically stated, "Inclusion of sexual orientation in this chapter shall not be construed to modify or supersede state law relating to marriage." However, employers should be aware that if benefits or privileges of employment are given to heterosexual persons who are married (insurance coverage for a spouse, for example, or an invitation for the family to join a company function), then the employer may be required under non-discrimination law to provide the same benefit or privilege to a person who is in a domestic partnership or is married to a same sex partner.

**Insurance**

**Can an insurer make decisions about issuing a policy or the terms of coverage based on a person's sexual orientation?**

An insurer is not allowed to consider a person's sexual orientation when making decisions about insurance policies. Insurers may not refuse to issue or cancel or decline to renew insurance coverage on the basis of sexual orientation.

**May an insurer discriminate on the basis of sexual orientation where bona fide statistical differences in risk or exposure have been substantiated?**

No. Although state law allows insurers to use actuarial distinctions in coverage on the basis of sex, marital status, or disability, no such exception exists for sexual orientation. No discrimination on the basis of sexual orientation is permissible.

**Employment**

**Who is considered an employer?**

The term "employer," for the purposes of this law, includes persons or organizations that employ eight or more persons, and does not include non-profit religious or sectarian organizations. The term "employee" does not include an individual employed by his or her parents, spouse, or child, or in the domestic service of any person.

Employment agencies and labor organizations are also subject to the Law Against Discrimination.

**Can an employer fire or refuse to hire an individual because of that person's sexual orientation or gender identity or expression?**

No. Employers may not consider sexual orientation or gender identity or expression when making hiring, firing or other employment related decisions. Employers are also prohibited from discrimination in compensation and other terms of employment based on sexual orientation or gender identity or expression.

**Can an employer ask about a person's sexual orientation on an application or during a job interview?**

No, employers are prohibited asking about a person's sexual orientation or any other protected class status during the hiring process.

**Is harassment based on sexual orientation by an employer or co-workers prohibited?**

Harassment against an employee based on that employee's sexual orientation or gender identity is prohibited. Harassment is defined as unwelcome behavior, based on a protected class, that is severe or pervasive and affects the terms and conditions of employment. In other words, the behavior must be so bad or occur so often, that it impacts the ability of the person to do their job or function in the workplace. If an employer is aware of the harassment, or should be aware, then the employer has a duty to take prompt and remedial action to stop the harassment. The person who is being harassed should make a complaint of harassment, preferably in writing, to his or her manager or the human resources department.

Employers are encouraged to have a written non-discrimination policy and anti-harassment policy, and to include sexual orientation and gender identity in these policies.

**How does a company's dress code apply to transgender employees?**

Employers should permit employees to dress in a manner that is consistent with their gender identity or expression, while complying with dress codes and grooming standards.

Employers may ask transitioning employees who have continuing relationships with clients or customers to present consistently as a particular gender throughout the transition.

Employers have a right to establish employee dress and grooming guidelines during work hours if they are reasonable and serve a legitimate business purpose. Such a purpose may include safety, such as requiring employees to wear closed toe shoes, goggles or gloves. Certain professions, such as law enforcement, fire departments and emergency response personnel, require employees to wear uniforms and/or protective clothing so that they are clearly recognizable to the public and stay safe. Other employers implement dress codes in order to maintain a certain image with customers and competitors, and can do so as long as the codes do not unduly burden one sex.

If employers do wish to have a dress code, employers are encouraged to make that dress code gender neutral; men and women would be required to wear the same uniform, for example, or the dress code would avoid requirements such as skirts or high heels.

### **What restroom should a transitioning employee use?**

If an employer maintains gender-specific restrooms, transgender employees should be permitted to use the restroom that is consistent with the individual's gender identity.

Where single occupancy restrooms are available, they may be designated as "gender neutral." All employers need to find solutions that are safe, convenient and respect the transgender employee's dignity. If someone is uncomfortable using a particular restroom for whatever reason, it is up to that person to find an alternative restroom.

### **Will a transgendered employee require specialized medical treatment?**

In some situations, employees who are transitioning may require medical treatment for their transition. Surgery and recovery from surgery may be considered to be temporary disabilities under the Law Against Discrimination. Any request for a reasonable accommodation due to a medical procedure, such as a request for time off, must be addressed in the same manner as with any other employee who has a medical condition. Generally, employers are required to provide reasonable accommodation to persons with disabilities and temporary disabilities. Additional medical issues requiring medical leave could include therapist visits, doctor's office visits, and hormone therapy. An employee who seeks medical treatment due to transitioning also must be able to use sick leave, vacation leave, and shared leave in a manner that is consistent with how other employees are able to use such leave.

### **Is an employer required to change the name and/or sex of a transitioning transsexual employee in company records?**

Employers should ask a transgender employee what name and sex-specific pronoun he or she prefers, and use them consistently. Legal company records should reflect the employee's legal name. If that name is not consistent with the employee's gender presentation an employer can still ensure that all (non legal) references to the employee's name and gender (especially e-mail, photo ID, organization charts and directories, and workplace signs) are consistent with the employee's gender identity and expression.

### **When an employee transitions, what are an employer's responsibilities with respect to other employees?**

The privacy of the transitioning employee must be respected, but with some transgendered individuals, there may come a time when the transition will become obvious or the employee will wish that their co-workers become aware of the transition. The concept of a transgender individual may be a new one to many people. They may have misconceptions about the need to transition or appropriate behavior towards transgender co-workers. As is the case with sexual harassment, employers are responsible for non-discrimination, maintaining a non-hostile work

environment, establishing clear policies on gender identity and expression, and educating all employees as to the policies.

Co-workers may need guidance on appropriate use of names and pronouns, restroom use policy, discretion as to an employee's transgender status, and the prohibition of harassment and discrimination against their transgender co-workers. Bringing in a consultant to provide training on gender identity sensitivity and awareness has been helpful to many companies.

### **What should an employer do with respect to background checks or references for transgender employees?**

Transgender job candidates who have already transitioned and changed their name may have worked, gone to school, or established credit in their former name. A background check or reference may disclose this name. Employers should keep in mind that the law forbids discrimination based on gender identity and expression, and that the use of a different name occurs for many reasons. If it is unavoidable that an employer asks for previous names, the employer should take care to treat the candidate exactly as any other candidate whose name has changed would be treated.

An employer may be asked to give a reference for a former employee who has transitioned or changed their name. The employee's former name may not match the new name expected by the person checking the reference. In this case, the person giving the reference should use the person's new name and preferred pronouns. If asked, the former name may be confirmed. Because gender identity and expression are unlawful considerations in employment, the former employer may not disclose the employee's transgender status when giving a reference.

### **Can an employer ask employees or applicants to identify their sexual orientation or gender identity for statistical purposes?**

There is no requirement under Washington law to keep statistical or equal employment opportunity data on sexual orientation. If a business has a diversity policy in place, and that policy covers sexual orientation, employees could be asked to identify their sexual orientation and gender identity under limited circumstances, such as to monitor the success of the diversity policy. If the information was gathered through voluntary participation, held confidential, not used in any employment decisions, and was treated the same as other demographic information (such as race, age, sex), then the employer could ask employees to self-identify their sexual orientation and gender identity.

### **Should an employee be allowed leave time to take care of a same-sex partner, or the parent or child of a same sex partner?**

The Family Medical Leave Act of 1993 (FMLA) allows legally married, opposite sex couples to obtain leave up to 12 weeks to care for a spouse or spouse's parent under certain circumstances, such as a serious illness. The FMLA does not extend the benefit to unmarried couples, regardless of sexual orientation, in situations in which an employee's partner or partner's parent is ill. Since this is a federal law, and federal law does not recognize marriage between same sex

couples, employees will not be entitled to FMLA to care for a same sex spouse, or a family member of a same sex spouse. In certain circumstances, the employee may be eligible to take leave to care for their legally adopted child or foster child, or for a newly adopted child.

Washington State's Family Care Act (2002) allows workers with available paid sick leave or other paid time off to care for a sick child with a routine illness; a spouse (including a same sex spouse), registered domestic partner, parent, parent-in-law (including the parent of a same sex spouse or domestic partner), or grandparent with a serious or emergency health condition; and an adult child with a disability.

Any other type of leave, such as leave without pay or shared leave, must be applied consistently; if an employee can use such leave to care for an opposite sex spouse, then an employee with a domestic partner or same sex spouse must be allowed to utilize such leave in the same way.

### **Public Accommodation**

#### **What is considered to be a place of public accommodation?**

Generally, any place that sells goods, offers food or drink for charge, is a place of entertainment, recreation or assembly, or is for the lodging of guests is included in the definition of place of public accommodation, as are schools, government buildings, libraries, museums, medical offices, public conveyances, and theatres.

#### **Are their exclusions to what is a place of public accommodation?**

Groups that are distinctly private are not included in the definition of place of public accommodation. Examples would be some fraternal organizations with limited outside activity and groups such as book clubs that meet in members' homes. In addition, a religious institution in the activity of conducting worship services is not a place of public accommodation, and neither are religious educational institutions. However, other church-sponsored activities, such as a soup kitchen or public bake sale, might be considered a place of public accommodation.

#### **Are businesses such as wedding planners and wedding photographers able to limit their services to heterosexual couples?**

No, these are generally going to be places of public accommodation and must provide their services on a non-discriminatory basis to all couples.

#### **Can religious officiates refuse to marry same sex couples, and can religious institutions refuse to rent equipment or space for weddings?**

Yes, Referendum 74, the 2012 law related to marriage, allows clergy to refrain from marrying same sex couples, and allows religious institutions to refrain from providing marriage related services to same sex couples. This would not be a violation of the Law Against Discrimination.

